Fair Political Practices Commission
MEMORANDUM

To: Chairman Getman, Commissioners Downey, Knox, and Swanson

From: Lawrence T. Woodlock, Senior Commission Counsel
Luisa Menchaca, General Counsel

Subject: Express Advocacy: Recent Developments in Case Law

Date: February 21, 2003

Introduction

"Express advocacy" is a term crucial to government regulation of campaign advertising. Its central importance grew out of the Supreme Court's initial review of the Federal Election Campaign Act, where the Court found that the First Amendment will sanction regulation of campaign speech only when that speech is "coordinated" with a candidate,[1] or contains what has come to be called "express advocacy." Thus in California any person spending more than a threshold amount on speech that includes "express advocacy" becomes a "committee" under the Act, subject to associated public filing and disclosure obligations, and contribution limits.

Because of its importance, the definition of "express advocacy" has had a long history, worked out in federal and state courts over the past 26 years. Two recent decisions by California appellate courts interpret the Act's definition of "express advocacy," a development suggesting to staff that the Commission may wish to review its current regulations on this point. After an overview of case law to supply necessary context, this memorandum explains how these recent decisions construe "express advocacy" under the Act, flags matters the Commission may wish to consider in coming months, and offers the public an opportunity to comment on the same topics.

1. Background

In *Buckley*, the Supreme Court found that the Constitution required a *narrow* definition of "expenditures" on political speech that that were subject to regulation under the federal act. (*Id*., 424 U.S. at 79.) Thus a person that was neither a candidate nor a committee could still become subject to governmental regulation, with reporting and disclosure obligations, if that person made expenditures on communications "unambiguously" campaign related – because they contained "express advocacy." The Court had defined "express advocacy" earlier in the decision, saying that the federal statute "must be construed to apply only to expenditures for communi-cations that in express terms advocate the election or defeat of a clearly identified candidate for federal office." (*Id*. at 44) In a gloss on this sentence, the Court remarked:

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[1] The decision referenced here is *Buckley v. Valeo*, 424 U.S. 1 (1976). Because federal elections do not include ballot measure contests, the *Buckley* court discussed only candidate elections. Later cases involving the law of states with ballot measure elections recognize governmental interests supporting similar regulation of speech in ballot measure campaigns. (See, e.g. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).)

> "This construction would restrict the application of s 608(e)(1) to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject'." (*Id*., footnote 52.)

Three months after the *Buckley* decision was handed down, the Commission adopted regulation 18225, which codified these newly announced principles in language still preserved in regulation 18225(b)(2).[2]

In 1987 the Ninth Circuit Court of Appeals interpreted *Buckley's* explanation of "express advocacy" in *FEC v. Furgatch,* 807 F. 2d 807 (9th Cir. 1987). The *Furgatch* court construed *Buckley's* comments on "express advocacy" in light of the resources of human language, which might be exploited to circumvent the federal act's application to "spending that is unambiguously related to the campaign of a particular federal candidate" (as phrased by *Buckley*). The principle elements of the *Furgatch* analysis are as follows:

> "We begin with the proposition that 'express advocacy' is not strictly limited to communications using certain key phrases. The short list of words included in the Supreme Court's opinion in *Buckley* does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate. A test requiring the magic words 'elect,' 'support,' etc. or their nearly perfect synonyms for a finding of express advocacy would preserve the First Amendment right of unfettered expression only at the expense of eviscerating the Federal Election Campaign Act. 'Independent' campaign spenders working on behalf of candidates could remain just beyond the reach of the Act by avoiding certain key words while conveying a message that is unmistakably directed to the election or defeat of a named candidate." (*Id*. at 862-863.)
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> "We reject the suggestion that we isolate each sentence and act as if it bears no relation to its neighbors. This is not to say that we will not examine each sentence in an effort to understand the whole. We only recognize that the whole consists of its parts in relation to each other." (*Id*. at 863.)
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> "We conclude that context is relevant to a determination of express advocacy. A consideration of the context in which speech is

[2] Order Adopting Regulations of the Fair Political Practices Commission dated April 22, 1976. As originally drafted, current subdivision (b)(2) was then subdivision (c)(2).

> uttered may clarify ideas that are not perfectly articulated, or supply necessary premises that are unexpressed but widely understood by readers or viewers. We should not ignore external factors that contribute to a complete understanding of speech, especially when they are factors that the audience must consider in evaluating the words before it. However, context cannot supply a meaning that is incompatible with, or simply unrelated to, the clear import of the words." (*Id*. at 863-864.)
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> "With these principles in mind, we propose a standard for 'express advocacy' that will preserve the efficacy of the Act without treading upon the freedom of political expression. We conclude that speech need not include any of the words listed in *Buckley* to be express advocacy under the Act, but it must, when read as a whole and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate. This standard can be broken into three main components. First, even if it is not presented in the clearest, most explicit language, speech is 'express' for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed 'advocacy' if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be 'express advocacy of the election or defeat of a clearly identified candidate' when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action." (*Id*. at 864.)

Many federal courts have criticized *Furgatch* for shifting the focus of the Supreme Court's analysis from the *words* of a communication towards larger, less tangible *impressions* of the message. The federal regulation based on *Furgatch* has been found unconstitutional by a number of courts, whose common ground seems to be that *Furgatch* overlooks *Buckley's* fundamental point that express advocacy should be narrowly defined to exempt from regulation political speech that is not clearly and obviously related to a particular campaign. The Ninth Circuit has not considered the topic of express advocacy since 1987.[3]

Commentary on the sufficiency of the *Furgatch* analysis is of interest to the Commission because the Act's definitions of "express advocacy," at § 82031 and regulation 18225(b)(2),

[3] The Ninth Circuit may take up this subject in the Commission's *ProLife* litigation, now pending decision before the Ninth Circuit.

contain expressions similar to some of the controversial portions of the *Furtgatch* decision, highlighted in italics below:

> " 'Independent expenditure' means an expenditure made by any person in connection with a communication which expressly advocates the election of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, *or taken as a whole and in context, unambiguously urges a particular result in an election* but which is not made to or at the behest of the affected candidate or committee." (Section 82031.)
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> "A communication 'expressly advocates' the nomination, election or defeat of a candidate or the qualification, passage or defeat of a measure if it contains express words of advocacy such as 'vote for, elect, support, cast your ballot, vote against, defeat, reject, sign petitions for *or otherwise refers to a clearly identified candidate or measure so that the communication, taken as a whole, unambig-uously urges a particular result in an election*. (Regulation 18225(b)(2).)

Section 82031 and regulation 18225(b)(2) contained the italicized language long before *Furgatch* was decided,[4] but although *Furgatch* is not the source of this language, similarities in language may suggest to some observers an approach to the identification of express advocacy that is consistent with *Furgatch*. As a result, challenges to *Furgatch* can be extended to imply constitutional infirmity in § 82031 and regulation 18225(b)(2).

2. The Schroeder and Davis Opinions (copies attached)

On March 6, 2002 the Fourth District Court of Appeal decided *Schroeder v. Irvine City Council et al*, 97 Cal.App. 4th 174 (review denied June 26, 2002). *Schroeder* was an action by a taxpayer seeking reimbursement to the city from individual members of the city council for expenditure of city funds on a voter registration program, which plaintiff characterized as an illegal expenditure of public funds designed to promote the passage of a local ballot initiative, Measure F. The trial Court granted defendants' motion to strike the Complaint under California's "anti-SLAPP" statute, which plaintiff appealed.[5]

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[4] As noted above, regulation 18225(b)(2) was adopted in 1976, shortly after *Buckley* was issued and eleven years prior to the publication of *Furgatch*. Section 82031 was enacted in 1979.

[5] Code of Civil Procedure § 425.16 requires that an action be dismissed if plaintiff cannot establish a probability of success on the merits after defendant has made a preliminary showing that the action grew out of defendant's exercise of free speech rights. There was no dispute regarding the sufficiency of defendants' showing in *Schroeder*. The question on appeal was limited to plaintiff's likelihood of success on the merits of the action.

Schroeder argued on appeal that regulation 18225(a)(1) "makes all expenditures campaign expenditures subject to the PRA if their purpose is to influence the action of the voters for or against the passage of any measure" (*Id*. at 340). The Court concluded that this contention was unsupported by case law or Commission advice, and that it was contradicted by the terms of § 82031 and regulation 18215(c)(1), which provides that an expenditure on a communication in connection with voter registration activities is not a "contribution" under the Act, unless the communication constitutes "express advocacy." The Court concluded that the funds at issue in *Schroeder* would amount to an unlawful political expenditure only if they were used for com-munications that "either expressly advocated, or taken as a whole unambiguously urged passage or defeat of Measure F." (*Id*. at 187-188, summarizing § 82031 and regulation 18225(b)(2), quoted above.)

Plaintiff then argued that, under *Furgatch*, a determination on the existence of express advocacy in a communication cannot be limited to the contents of the communication, but must also consider the context of the speech which, in this case, would be the city's well known position against the matter coming before the voters in Measure F, and the voters' own historical tendency to oppose that matter. (*Id*. at 188.) The Court observed that "most federal courts have eschewed efforts to transform ambiguous messages into express advocacy based on external contextual factors," and that:

> "[E]ven if *Furgatch* retains vitality, Schroeder overstates the extent to which it permits reference to *external* context. *Furgatch* interpreted and refined or made more comprehensive the definition of express advocacy set out in *Buckley v. Valeo*. Because *Furgatch* believed *Buckley's* list of words of advocacy did not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate, it permitted evaluation of the internal textual content of the words used to determine whether the speech as a whole constituted express advocacy. *Furgatch's* focus was on the communication itself, not external factors…" (*Ibid*., internal quotation marks and citations omitted; emphasis in original).

The Court concluded at page 189 that "even under Furgatch," and even if some limited consideration could be given to external context, express advocacy must present a clear plea for action and specify without ambiguity the action that is urged. And so the voter registration messages at issue in *Schroeder*, "whether tested under Regulation 18225, the majority federal rule, or *Furgatch*, do not qualify as express advocacy and therefore are not the result of political expenditures." (*Id*. at 189.)

The *Schroeder* Court recognized that the teaching of *Furgatch* was not the same thing as "the majority federal rule," but it rejected plaintiff's invitation to read *Furgatch* as supporting a particularly expansive view of "express advocacy." Because *Furgatch* could be aligned with other sources of authority against plaintiff, the *Schroeder* case did not require the Court to

choose among competing authorities.

Six months after the Fourth District decided *Schroeder*, the First District Court of Appeal published its decision in *The Governor Gray Davis Committee v. American Taxpayers Alliance*, 102 Cal.App.4th 449 (2002, review denied December 22, 2002).[6]

The lawsuit in *Davis* grew out of television advertisements run by defendant American Taxpayers Alliance in the summer of 2001, criticizing Governor Davis' handling of the state's energy crisis. Defendant had filed neither a Statement of Organization nor a semi-annual report in California, which plaintiff thought was required under §§ 84101 and 84200 because of the political character of the advertisement. As in *Schroeder*, defendant responded with a SLAPP suit motion under CCP § 425.16. Here the trial court agreed with plaintiff that the advertisement expressly advocated the defeat of Governor Davis in the upcoming statewide election, and granted plaintiff's request for a preliminary injunction against continuing violation of the Act's reporting requirements. At the same time, the trial court denied defendant's SLAPP suit motion.

This decision was reversed on appeal. The Court found that the Complaint alleged that protected speech gave rise to reporting obligations which plaintiff had manifestly ignored. (*Id*. 102 Cal.App. 4th at 459.) The issue, as framed by the Court, was defendant's right to run the ad without filing campaign statements or identifying donors to defendant's organization.

The second step of the analysis was an assessment of the merits of plaintiff's claim that defendant had no constitutional right to ignore California's reporting rules – specifically the requirement of § 84101 that defendant file a Statement of Organization, and that it file semi-annual statements (as a committee) under § 84200.[7]

Defendant had argued that only express advocacy may be subject to regulation, and plaintiff responded that the speech at issue *was* express advocacy. The Court took up this debate, noting that the "expenditure" which creates an obligation to comply with California law is defined to include communications "expressly advocating" the election or defeat of a clearly identified candidate. (*Id*. at 461-462; § 82031; Reg. 18225(b)(2).) Citing *Buckley* and *MCFL*,[8] the Court observed that disclosure of the kind at issue in this case could be compelled *only* in response to communications containing "express advocacy." (*Id*. at 465-466.)

The Court found no express advocacy in the advertisement at issue. Plaintiff's citation of *Furgatch* to support the contrary argument caused the Court to dwell at length on the perceived deficiencies of that opinion. The Court first noted that it was not bound to accept *Furgatch* as

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[6] The Commission, the California Attorney General, and the San Francisco Ethics Commission filed "Amicus Letters" with the California Supreme Court supporting plaintiff's unsuccessful Petition for Review. The Los Angeles City Ethics Commission requested that the opinion be depublished.

[7] A person receiving contributions of $1,000 or more in a calendar year qualifies as a recipient committee under the Act. (Section 82013(a).)

[8] *FEC v. Massachusetts Citizens For Life* (1986) 479 U.S. 238.

controlling authority, that the authority of *Furgatch* in any event is entitled to no greater weight than that of the federal circuits in conflict with it, and that *Furgatch* is, in fact, "the sole departure from the bright line test of express advocacy articulated by the United States Supreme Court in *Buckley*." (*Id*. at 468.)

The Court observed that "[an FEC regulation], which was derived directly from the language of *Furgatch*, has also been repeatedly and uniformly found violative of the First Amendment by the federal courts." The Court said that, since *Buckley* and *MCFL* limited federal regulatory authority to communications expressly advocating the election or defeat of a clearly identified candidate, a regulation based on *Furgatch* cannot pass constitutional muster insofar as it shifts the focus from the words themselves to the overall impressions of a hypothetical, reasonable viewer. (*Id*. at 469). After noting that a similar Iowa regulation had also been struck down on these grounds, the Court applied its reasoning to California:

> "The definition of an "expenditure" in the Political Reform Act must be equally limited in accordance with the First Amendment mandate "that a state may regulate a political advertisement only if the advertisement advocates *in express terms* the election or defeat of a candidate. … The *Furgatch* test is too vague and reaches too broad an array of speech to be consistent with the First Amendment as interpreted in Buckley and MCFL. Instead, we iterate that the language of the communication must, by its express terms, exhort the viewer to take a specific electoral action for or against a particular candidate. Although application of this rule may require making straightforward connections between identified candidates and an express term advocating electoral action (as in *MCFL*), the focus must remain on the plain meaning of the words themselves. Under the bright-line test of *Buckley*, contextual factors are irrelevant to our determination whether the advertisements contain express advocacy. (*Id*. at 470, emphasis in the original, internal quotation marks and citations omitted.)

The Court had earlier said that, "in our examination of the coverage and validity of the Political Reform Act we must also adhere to the fundamental rule that a statute must be interpreted in a manner, consistent with the statute's language and purpose, that eliminates doubts as to the statute's constitutionality." (*Id*. at 464.) Seven pages later, the Court decided that it must impose a narrow "saving" construction on §§ 82031, 82025, and regulation 18225, applying these provisions "only to those communications that contain express language of advocacy with an exhortation to elect or defeat a candidate." (*Id*. at 471.)

In both *Schroeder* and *Davis*, a court encountered a plaintiff who read *Furgatch* expansively in support of an unsuccessful claim that a communication was express advocacy.

The *Schroeder* court did not accept plaintiff's reading of *Furgatch* and, in effect, construed that decision narrowly to harmonize it with the federal majority rule. The *Davis* Court, on the other hand, chose not to attempt a "narrowing construction" of *Furgatch*, but rejected the decision outright as the product of faulty analysis. Instead, the Court imposed a narrowing construction on those portions of § 82031 and regulation 18225(b)(2) that might be interpreted as supporting a "*Furgatch*-like" analysis, to harmonize the challenged provisions with the federal majority rule.

3. Problems and Response Options

In *Furgatch*, the Ninth Circuit interpreted the United States Constitution to determine the constitutional limits of federal statutes that define and regulate "express advocacy." For fifteen years thereafter, the Commission has often relied on *Furgatch* to explain the constitutional boundaries on construction and application of the Act's parallel provisions. Now for the first time California appellate courts have directly considered and interpreted the Act's provisions on express advocacy, and have registered disagreement with the constitutional analysis in *Furgatch* (albeit to varying degrees), advising that the Act's provisions should be construed more narrowly than *Furgatch* would require. After the *Davis* decision, the regulated community has expressed an interest in learning the extent to which the Commission may reinterpret § 82031 and regulation 18225(b)(2).[9] But there have been no concrete proposals, apart from a letter by Mr. Bell.

The *Schroeder* and *Davis* decisions agree that the Act's definition of "express advocacy" should be read with an eye towards proliferating critiques of *Furgatch*. Although the *Davis* court rejected much of the substance of *Furgatch*, it did reach the constitutional sufficiency of § 82031 and regulation 18225(b)(2), finding that these provisions could be construed in a manner that preserves their constitutionality. The Commission is not required, therefore, to repudiate or cease to enforce its existing rules, although it may choose to adopt clarifying amendments to affected regulations. Alternatively, the Commission may simply direct staff to remain alert to possible changes in advice appropriate under *Schroeder* or *Davis*, and return to the Commission for further direction as and when policy questions arise. This may be an appropriate course in light of pending decisions from the Ninth Circuit in the Commission's *ProLife* case, and from the special panel preparing to rule on the recently-enacted Bipartisan Campaign Reform Act.[10]

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[9] Thus the Bell Opinion request was received just six days after the Supreme Court denied review in *Davis*. The Bell request sought an affirmation by the Commission that it would "follow" *Davis* by ceasing to enforce the last sentence of regulation 18225(b)(2).

[10] At the *ProLife* hearing, the Ninth Circuit panel twice asked the parties if they believed that any matters before the Ninth Circuit should be certified as questions for the California Supreme Court. The parties responded in the negative, but the questions indicate that the Ninth Circuit may be deliberating on fundamental principles that could require the same kind of review under consideration in this memorandum.

There is one question that may require early attention: determining the permissible use of *context* in the application of § 82031 and regulation 18225(b)(2). The statute expressly allows reference to "context" in evaluating the meaning of a communication. *Schroeder* recognizes an "internal context" whereby the elements of a message (words or sentences) are read together to determine the meaning of the message as a whole, a process approved by the Supreme Court in *MCFL*.

Schroeder is a bit more cautious on the use of "external" context as an interpretative aid, but appears to leave the question open. *Davis* ostensibly prohibits references to external context, but the Court itself refers to the date of an upcoming election as significant to its analysis of the advertisement at issue. (*Id*., 102 Cal.App. 4th at 471.) A limited reference to external events, especially proximity to an election, may or may not be consistent with these decisions. At present, Enforcement Division staff, and many persons filing complaints under the Act, regard proximity to an election as an important, commonsense aid to interpreting the meaning of election-eve communications.

If the Commission were to conclude that *no* reference to external context is permissible, it might be appropriate to amend regulation 18225(b)(2) to expressly limit and explain the statute's use of the term "context." If the Commission found that limited reference to external events was constitutionally permissible, it might also be worthwhile to adopt an amendment so stating. If the Commission wishes to consider such an amendment, staff would need time for research into the avenues open to the Commission, and to draft an appropriate amendment for pre-notice discussion in May.

Staff Recommendation

Staff is operating under an assumption that the Commission is required to follow the *Davis* decision. The Attorney General's office is presently conducting research into this surprisingly difficult question, and will advise staff of its conclusion before the upcoming meeting. For the present, on the assumption that the Commission will wish to construe the Act in conformity with the *Davis* opinion, staff suggests that the Commission direct it to consider whether regulation 18225(b)(2) should be amended to clarify the meaning of "context" in § 82031. Staff's research would include identification of advice letters, if any, that should be rescinded, and staff would conduct an interested persons' meeting to solicit public comment.